

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MARION FUTRELL,

Defendant-Appellant.

UNPUBLISHED

May 2, 1997

No. 194865

Berrien Circuit Court

LC No. 95-2346-FH

Before: Griffin, P.J., and Doctoroff and Markman, JJ.

PER CURIAM.

Defendant was convicted of possession with intent to deliver less than fifty grams of the controlled substance cocaine. MCL 333.7401(1) and (2)(a)(iv); MSA 14.15(7401)(1) and (2)(a)(iv). He was sentenced to a prison term of three to twenty years. He appeals as of right. We affirm.

First, defendant argues there was insufficient evidence to sustain his conviction. We review sufficiency of evidence claims to determine whether a rational trier of fact could have found that the essential elements of the crime were proven beyond a reasonable doubt when viewing the evidence in the light most favorable to the prosecution. *People v Wolfe*, 440 Mich 508, 515; 489 NW2d 748 (1992); *People v Head*, 211 Mich App 205, 210; 535 NW2d 563 (1995).

To support a conviction of possession with the intent to deliver less than fifty grams of cocaine, the prosecution must prove the following four elements: (1) the substance is cocaine, (2) the cocaine is in a mixture weighing less than fifty grams, (3) defendant was not authorized to possess the cocaine and (4) defendant knowingly possessed the cocaine with the intent to deliver. *Wolfe, supra* at 516. The fourth element has two components, (1) possession and (2) intent to deliver. *Id.* at 519. Defendant claims that there was insufficient evidence only with respect to the two components of the fourth element.

A person in possession of a controlled substance exercises dominion or right of control over the drug with knowledge of its presence and character. *People v Richardson*, 139 Mich App 622, 625;

362 NW2d 853 (1984); *People v Mumford*, 60 Mich App 279, 282; 230 NW2d 395 (1979). Possession should be construed in its commonly understood sense and may be proven by circumstantial evidence and reasonable inferences therefrom. *Id.* at 282-283.

According to the testimony presented at trial, following a stop of his vehicle, defendant fled on foot. A police officer testified that during the ensuing chase, he saw defendant pull a plastic bag from his front pants pocket. That officer lost sight of defendant as he ran over a hill but another officer caught sight of defendant at that time. However, defendant then veered out of that officer's sight as well in the direction of a nearby house. One of the occupants of the house testified that a bag, which was subsequently determined to contain cocaine, was thrown through an open window of the house. Defendant was apprehended shortly thereafter. Viewing the evidence in the light most favorable to the prosecution, we conclude that a rational trier of fact could reasonably infer that the bag thrown through the window was that which the officer observed defendant removing from his pants pocket.

We also conclude that there was sufficient evidence of defendant's intent to deliver. One of plaintiff's experts testified that the bag contained between 130 and 185 single hits of cocaine. Plaintiff's other expert testified that the amount of drugs in the bag is routinely found in the possession of mid-level dealers rather than mere users and that, in his experience, he had never before encountered a person who is solely a user with that quantity of cocaine.

Intent to deliver need not be proven by actual delivery of the drug. *Wolfe, supra* at 524. Rather, intent to deliver may be proven through circumstantial evidence and reasonable inferences arising from that circumstantial evidence. *Id.* at 526. Intent to deliver can be inferred from the quantity of narcotics in defendant's possession. *Id.* at 524; *People v Catanzarite*, 211 Mich App 573, 578; 536 NW2d 570 (1995). Based on the evidence presented by the prosecution's two expert witnesses, a rational trier of fact could reasonably infer that defendant had the intent to deliver the cocaine in the bag. Therefore, sufficient evidence was presented to sustain defendant's conviction of possession with intent to deliver.

Next, defendant argues that the trial court erred in admitting Officer Lange's testimony that he initially stopped defendant because he had previously stopped another person (defendant's brother) for driving the same vehicle with an open container of alcohol on a suspended driver's license. The decision whether to admit evidence is within the discretion of the trial court and we will not reverse the trial court's decision absent an abuse of discretion. *People v Coleman*, 210 Mich App 1, 4; 532 NW2d 885 (1995).

Defendant objected to the testimony at trial on the grounds of relevance. Relevant evidence is evidence that has any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence. MRE 401; *People v Brooks*, 453 Mich 511, 517; 557 NW2d 106 (1996). During trial, the *defendant* stated that he intended to make the reason for the initial stop an issue. Plaintiff's testimony was for the purpose of

showing why the initial stop was made. Consequently, the testimony was relevant. Therefore, the trial court did not abuse its discretion in admitting the testimony.

For the first time on appeal, defendant argues that the officer's testimony should have been excluded under MRE 403, because it misled the jury into believing that defendant is a drug dealer by association with the other driver, and under MRE 404(b) as inadmissible evidence of prior bad acts. Defendant, however, failed to object to the testimony on these grounds during trial. An objection based on one ground at trial is insufficient to preserve the issue for appeal based on other grounds. MRE 103(b); *People v Asevedo*, 217 Mich App 393, 398; 551 NW2d 478 (1996).

Nevertheless, we find that the evidence was properly admitted with regard to both MRE 403 and MRE 404(b). Under MRE 403, even relevant evidence may be excluded if the admission of the evidence would mislead the jury. See *People v Mills*, 450 Mich 61,75; 537 NW2d 909 (1995). At no point during the testimony did the officer allege that the other driver was a drug dealer or that defendant was being stopped because of drugs. Consequently, the testimony was not misleading to the jury in terms of suggesting that defendant, by association, was guilty of being a drug dealer.

MRE 404(b) provides that evidence of prior acts may be admitted if it is (1) relevant to an issue other than character or propensity, (2) relevant to an issue or fact of consequence at trial, and (3) its probative value is outweighed by the danger of unfair prejudice. *Catanzarite*, *supra* at 578-79. As discussed above, the testimony was relevant and was not unduly prejudicial. Additionally, the testimony related to the past conduct of a *third party*, not defendant, and was offered only for the purpose of showing why the officers stopped the vehicle.¹

Affirmed.

/s/ Richard Allen Griffin

/s/ Martin M. Doctoroff

/s/ Stephen J. Markman

¹ See *People v Catanzarite*, 211 Mich App 573, 579; ___ NW2d ___ (1995). Defendant also argues that the trial judge failed to conduct an evidentiary hearing regarding the admissibility of the evidence pursuant to *People v VanderVliet*, 444 Mich 52; 508 NW2d 114 (1993). However, defendant did not request that an evidentiary hearing be held. Defendant mischaracterizes *VanderVliet*, which does not require that the trial court hold an evidentiary hearing under such circumstances.